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No. 83-166.

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

ROBERT ANGELO GUIPPONE AND
ANTHONY MICHAEL PORCELLI,
PETITIONERS,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

~~Motion for Leave to File~~ Brief Supporting Petition for Certiorari and Brief in Support of Petition for Certiorari for the Undersigned Defense Counsel as *Amici Curiae*.

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Motion for Leave to File Brief Supporting Petition for Certiorari as Amicus Curiae.

The undersigned counsel, as defense counsel at the trial of Robert Angelo Guippone and Anthony Michael Porcelli, hereby respectfully move for leave to file a brief as *amici curiae* in this case in support of petitioners, as provided in Rules 36 and 42 of the rules of this Court. The consent of the attorneys for the petitioners has been obtained. ~~The consent of the attorneys for the respondents was requested but refused.~~

Nature of the Applicants' Interest.

The undersigned counsel, as persons who are actively engaged in criminal defense practice and who are frequently engaged in trials involving the use of electronic surveillance tapes as evidence, have factual information which should be of assistance to this Court and which is of great significance to this case in light of the findings of the Second Circuit Court of Appeals on the precise issues raised in the petition of Robert Guippone and Anthony Porcelli. The basic issue is of the deepest concern to the criminal defense bar. Where electronic surveillance tapes comprise the totality of the evidence against a defendant, and the defendant asserts to his attorney that the tapes are altered and distorted so as to misrepresent the meaning and import of his conversations, counsel must have access to the originals of said tapes for expert independent analysis. Where such access is requested and denied, and where the trial court places on the defendant the burden of proving tampering with the tapes without the access to the original tapes which is absolutely necessary for any reasonably accurate scientific assessment as to whether the tapes have been tampered with or otherwise impaired, defense counsel is effectively barred from properly raising or preserving his/her client's Sixth Amendment and Due Process rights.

Defense counsel, because of their professional responsibility, are directly and frequently concerned with questions of the authenticity and integrity of tape recorded evidence which the prosecution may seek to offer against their clients. It is their unavoidable duty to raise all legal and proper objections to such evidence and to test that evidence in a sincere, honest and adversary fashion.

Facts that have Not Been Adequately Presented by the Parties and Reasons for Believing that they will Not be Adequately Presented Without the Assistance of Amici Curiae.

Petitioners' brief necessarily concentrates on the facts in support of their contention. However, given the erroneous findings of fact by the Second Circuit Court of Appeals, the undersigned counsel, who were present at the trial and have first-hand knowledge of the factual development of the issues presented by petitioners, are compelled to proffer to the Court their personal, first-hand knowledge of the facts, especially in light of the strict standards which petitioners must meet in order to persuade this Honorable Court that egregious error occurred.

In the brief tendered with this motion, the undersigned counsel offer a concise and to the point statement in support of the critical facts pressed by petitioners: that they were consistently denied access to the original tape recordings of their conversations for independent expert analysis, that they never sought to examine said recordings out of the custody and control of the prosecution, and that their requests were in no way, shape or form any sort of "threat" to otherwise "fragile" evidence.

Relevancy of the Brief of Amici Curiae to the Disposition of the Case.

Amici seek only to develop more fully the pertinent facts as to petitioners' challenge to the authenticity of the tapes, the prosecution's refusal and the trial court's denial of any meaningful opportunity to raise that challenge. We feel that our contribution is significant where the conclusion of law rests on fact-finding that is devoid of an evidentiary basis in the record. The Court should have the benefit of the facts as known

by counsel who were present at the trial and thus in a position to confirm and more fully develop those facts.

The intent of Congress to ensure the purity of electronic surveillance tapes is unquestionable. As technological advances create vast opportunities for invasion of privacy as well as manipulation of the product of such invasions, *amici* urge this Honorable Court to act to ensure the integrity of such evidence by defining the procedures to be followed and clarifying the burden of production and proof where such a challenge to the authenticity of surveillance tapes is necessarily raised. In the context of the present case, however, the Court is called upon to engage in consideration of the facts, as the issue raised is fact-bound and petitioners may be barred once again from raising their claims without an accurate factual finding.

As citizens, as well as defense lawyers, the undersigned are deeply concerned for the right of privacy, and greatly alarmed by the increasing reliance of the government on wiretapping and bugging as a primary investigative tool, especially in light of rapid technological advances which may have already outstripped the available legal procedures and evidentiary safeguards which have traditionally worked to ensure the integrity and purity of such evidence.

Wherefore, the undersigned defense counsel respectfully move that this Honorable Court grant their motion for leave to file a brief in support of the petition for writ of certiorari of

Robert Angelo Guippone and Anthony Michael Porcelli. Their concise and focused brief is respectfully attached herewith.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of Undersigned Defense Counsel as Amici Curiae in Support of Petition for Writ of Certiorari.

The undersigned defense counsel, as counsel at the trial of Robert Angelo Guippone and Anthony Michael Porcelli[1] here-

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[1] The parties to the proceeding in the court whose judgment is sought to be reviewed were Willard Williams, Saint Julian Harrison, Clarence Haynes, Onzelo Markum, Eric Nalven, Willie Terry, Paul Jenkins and petitioners Robert Angelo Guippone and Anthony Michael Porcelli. Supreme Court Rule 21.1(b).

by plead this Honorable Court in support of the petition for writ of certiorari filed by Mr. Guippone and Mr. Porcelli.

This brief is tendered for filing contingent upon the Court's granting the motion for leave to file a brief as Amici Curiae.

Interest of the Amici Curiae.

As defense counsel and as citizens, the undersigned counsel are deeply concerned with the procedures under which criminal justice is administered in the federal courts. *Amici* seek to file this brief in support of the facts as presented by petitioners because they have first-hand knowledge of the accuracy of those facts and the error of the Second Circuit Court of Appeals in its adverse findings of fact on the critical issues raised by the instant petition. It is the conviction of *amici* that petitioners have been deprived of any adequate means or manner in which to raise their Due Process and Confrontation claims by the decision of the court below, and that if this Honorable Court declines to examine the facts, petitioners will be deprived of any remedy.

A full statement of the interest of *amici* is set forth in the accompanying motion for leave to file brief as *amici curiae* in support of petition for writ of certiorari.

Summary of the Argument.

The facts as presented by petitioners on the question of whether they were denied access to the original tape recordings of their conversations for purposes of independent expert analysis are correct. Further, petitioners accurately claim

that the conditions under which they sought access to the tapes were more than adequate to protect the evidence and that they never sought to remove the tapes from the custody of the prosecution. The findings of the Second Circuit Court of Appeals are erroneous and without basis in the record. The trial court imposed on the defendants an impossible burden of proof, *i.e.*, that they should prove that the tapes were altered *before* being allowed the only access which could meet the court's stringent standard of proof of alteration. This Honorable Court's guidance is needed to set standards for review and remand where the findings of the Court of Appeals have no basis in the record.

Argument.

The Omnibus Crime Control and Safe Streets Act is the cornerstone of our national policy on behalf of the privacy rights of American citizens. One of its underlying premises is that electronic surveillance recordings must be received and kept inviolate. Although Congress took elaborate measures to ensure the integrity of surveillance tapes by requiring prompt *post*-surveillance sealing pursuant to 18 U.S.C. § 2518(8), there is, under the circumstances of the present case, no process for adequately ensuring that the tapes were not altered during the process of recording or immediately after recording, (*i.e.*, pre-sealing). The mandate of 18 U.S.C. § 2518(8)(a) that such recording be "done in such a way as will protect the recording from editing or other alterations" ceases to have any meaning if the only available procedures are aimed at *post*-interception protection of the integrity of the tapes, and if, as occurred herein, defendants are barred from scientific examination of the original tapes. It has been rec-

ognized that conversations can be edited to a defendant's detriment and that conversations can be recorded so that statements are taken out of context, as claimed by petitioners herein. See, *e.g.*, *United States* v. *Leta*, 332 F.Supp. 1357, 1360 (M.D. Pa. 1971).

Petitioners Porcelli and Guippone contend before this Honorable Court that they raised a timely and colorable claim that the surveillance tapes which the prosecution sought to offer against them as the only evidence linking them to the offenses charged had been altered or tampered with in such a way as to distort the import and substance of those conversations. They further contend that access to the original tapes for purposes of independent expert analysis was denied. *Amici Curiae*, as trial counsel at the trial of Mr. Porcelli and Guippone, urge this Honorable Court that those facts are true and accurate, and that the record, as extensively cited by petitioners, will confirm that. Should this Honorable Court require sworn affidavits from *amici* in support of the critical facts as presented by petitioners, *amici* would provide such.

Amici further urge the Court that, based on their own recollection, records and experience at the trial, there was never any request by petitioners' counsel (or other counsel) to remove the surveillance tapes from the custody of the prosecution. *Amici* submit that the record shows that:

(a) Defendants made repeated requests for access to the original tapes;
(b) The prosecution at all times refused to permit defendants' experts permission to examine same;
(c) The defendants never declined an offer to analyze said tapes; and
(d) Each and every request of the defendants for access to the original tapes contained more than adequate

assurances as to the government's continuing custody and control of the tapes, and in denying defendants' requests the trial court rested its denial on its perception that the defendants had not made an adequate showing and not on any concern for the conditions under which the examination was requested.

Conclusion.

As counsel at the trial of petitioners Robert Angelo Guippone and Anthony Michael Porcelli, the undersigned seek to support petitioners in their contentions as to the facts at issue in their petition now pending before the Court and to plead that certiorari should be granted as the questions presented are worthy of resolution. When a defense attorney sits down with a client to review surveillance tapes which the prosecution seeks to offer as evidence against that client, and is told by the client that the tapes do *not* represent his or her conversations, that there is something wrong with them, that they are distorted and things are left out so that the substance of the conversation is skewed and misleading, counsel's responsibility to attack the integrity of the tapes in good faith is clear. The Court should squarely meet the issues raised by petitioners. If it does not do so, the present uncertainty and confusion as to the applicable standards will continue to invite lengthy controversy and argument and further burden an already overburdened court system.

Amici further urge that the narrow and carefully delineated issues raised by petitioners Guippone and Porcelli are highly susceptible to clearly articulated standards, and without standards, are characteristic of the concerns articulated by the Honorable Justice Frankfurter in his prescient dissent in *On Lee* v. *United States*, 343 U.S. 747, 758-759 (1952):

> Loose talk about the war against crime too easily infuses the administration of justice with the psychology and morals of war. It is hardly conducive to the soundest employment of the judicial process. Nor are the needs of an effective penal code seen in the truest perspective by talk about a criminal prosecution's not being a game in which the Government loses because its officers have not played according to rule. Of course criminal prosecution is more than a game. But in any event it should not be deemed a dirty game in which "the dirty business" of criminals is outwitted by "the dirty business" of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet.

Out of respect for law and orderly process, and in awareness of the facts as they know them to have developed in the record of this case, the undersigned defense counsel hereby file this

brief in support of the petition for writ of certiorari of Robert Guippone and Anthony Porcelli.

Respectfully submitted,

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